

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 02-0508
SALES/USE TAX
For Years 1999 and 2000**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Use Tax – Definition of a contractor

Authority: 45 IAC 2.2-3-7(a)

Taxpayer protests it being defined as a contractor as stated in the statutes.

II. Use Tax – Violative of the Constitution

Authority: None cited

Taxpayer asserts that the disparate treatment of tools and machinery as determined according to the location where the project is undertaken violates the Constitution.

III. Use Tax – Imposition of the use tax on the purchase of items used in the digging of wells

Authority: § 6-2.5-3-2; 45 IAC 2.2-3-12(c)

Taxpayer asserts that, because its customers are exempt from gross retail tax, it should share in that exempt status.

IV. Use Tax – Disparity of treatment of oil and water extraction

Authority: § 6-2.5-4-5

Taxpayer claims that those taxpayers in the business of extracting water are treated differently from those taxpayers that extract oil.

STATEMENT OF FACTS

Taxpayer is in the business of drilling water wells and installing pumps and plumbing for residences, farms, and commercial entities in order to provide water for livestock and

human consumption. It also repairs and replaces equipment that is used to extract water from the ground. Taxpayer performs lump sum contracts and time and material contracts.

DISCUSSION

I. Use Tax – Definition of a contractor

In both its written appeal and at the hearing, taxpayer denies that it fits the definition of a contractor as defined in the statutes without any explanation as to why the definition fails.

45 IAC 2.2-3-7(a) gives a definition of a contractor for use in the sales and use tax scheme. It states:

(a) **Contractors.** For purposes of this regulation [45 IAC 2.2] "contractor" means any person engaged in converting construction material into realty. The term "contractor" refers to general or prime contractors, subcontractors, and specialty contractors, *including but not limited to* persons engaged in building, cement work, carpentry, plumbing, heating, electrical work, roofing, wrecking, excavating, plastering, tile and road construction. (Emphasis added).

Presumably, taxpayer's argument is that because well digging is not one of the enumerated examples of activities within the purview of what constitutes a "contractor," it ipso facto must not be one. Such is not the case, however, as the italicized wording of the statute indicates that the list is not all-inclusive.

Activities such as carpentry, roofing, electrical work, and especially plumbing and excavating, all point to the same overall goal – the production of a finished product of a structure attached to real property that is suitable to its inhabitant. Well digging would very much lend itself to being included in that list, as the digging of a well leads to the habitability of the structure. Therefore, the digging of wells is within the activities contemplated by the language "including but not limited to."

Also, taxpayer is engaged in the well-digging business. Its products and services are used by its customers to extract water from the ground. The wells become a part of the real property of the customer, be it a residence, farm, commercial building, etc. Therefore, through its conversion of water-extracting products along with services that ultimately bring water to its customers, taxpayer is converting construction material into realty. Taxpayer presents no evidence to refute this notion.

Taxpayer also points to the fact that its customers are involved in the process of "extracting" water from the earth. Extracting is also absent from the list of enumerated activities in the statutory definition of a contractor. In this case, it is unnecessary to decide whether or not the process of extracting is contemplated by the "including but not limited to" language, because the argument is invalid on its face. Taxpayer may not make use of its customers arguments in this situation. It is taxpayer's customers that undertake

the extraction of water from the ground, not the taxpayer itself. Therefore, taxpayer may not make use of this argument.

FINDINGS

The taxpayer is respectfully denied.

II. Use Tax – Violative of the Constitution

DISCUSSION

The taxpayer apparently believes that the sales and use tax statutes are violative of the Constitution. Taxpayer doesn't state which statutes in particular are unconstitutional, nor does it name a particular clause of the Constitution that is being violated. Therefore, given the paucity of taxpayer's argument, the presumption of constitutionality afforded state statutes, and the fact that an administrative hearing in the Indiana Department of Revenue is not the proper forum to challenge the constitutionality of tax statutes, the Department must decline to address this issue.

FINDINGS

The taxpayer is respectfully denied.

III. Use Tax – Imposition of the use tax on the purchase of items used in the digging of wells

DISCUSSION

A use tax is assessed under § 6-2.5-3-2, which reads:

- (a) An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Taxpayer purchased tools, equipment, repair parts, fuel, etc., that were used during construction and for which taxpayer neither paid Indiana gross retail tax nor remitted use tax to the Department. Taxpayer claims that, because its customers are exempt, it too should be exempt from use tax.

The Department need not reach a conclusion concerning the validity of the claim that taxpayer's customers are exempt from use tax, regardless of the theory that taxpayer espouses. The fact is that 45 IAC 2.2-3-12(c) already speaks to the issue:

Utilities, machinery, tools, forms, supplies, equipment, or any other items used or consumed by the contractor and which do not become a part of the improvement

to real estate are not exempt regardless of the exempt status of the person for whom the contract is performed.

The outcome is clear. Taxpayer may not make use of its customers' exemptions under these circumstances.

FINDINGS

The taxpayer is respectfully denied.

IV. Use Tax – Disparity of treatment of oil and water extraction

Taxpayer believes that those companies engaged in the business of water extraction are unfairly treated from those companies engaged in the business of oil extraction. Taxpayer cites to no specific deferential treatment upon which to base its claim.

The only statute that appears on point is § 6-2.5-4-5, which defines the term "power subsidiary." These statutes would seemingly only apply to the transaction between the taxpayer and its customers – transactions that are not at issue under the circumstances. The transactions at issue here are the purchases of equipment by the taxpayer from retail merchants. The taxpayer's customers don't enter the equation.

Finally, because such a disparate treatment argument lends itself to a Constitutional analysis, an administrative hearing is an inappropriate forum to entertain such arguments, as was mentioned in Issue II above.

FINDINGS

The taxpayer is respectfully denied.